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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-734

JOSEPH RAYMOND GOMEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH JUDICIAL CIRCUIT

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IN THE

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JOSEPH RAYMOND GOMEZ,

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v.

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH JUDICIAL CIRCUIT

TO: Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Joseph Raymond Gomez, hereby petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Tenth Judicial Circuit which affirmed the Judgment of the United States District Court, District of Colorado, connecting the Petitioner of unknowingly and intentionally distributing and aiding and abetting in the distribution of a quantity of heroin in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2, respectively.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals has not been reported in the Federal Reporters. A copy of the opinion is appended to this Petition (Appendix A). The

Court's order denying Petitioner's Motion for a Rehearing is appended hereto (Appendix B).

JURISDICTION

The order sought to be reviewed was made and entered on the 7th day of September, 1973. An order denying a timely motion for rehearing was made and entered on October 2, 1973. The statutory provisions believed to confer jurisdiction on this Court to review the Judgment in question by Writ of Certiorari is 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the verdict below must be reversed by reason of the failure and the refusal of the government to allow discovery of Petitioner's Pre-Arrest Statements made to a government undercover agent.

2. Whether the District Court erred in denying Petitioner's Motion for a New Preliminary Hearing or in the alternative Dismissal of the Case on the grounds that valuable evidence to which Petitioner was entitled has been seriously damaged due to faulty mechanical recording of the earlier preliminary hearing.

STATUTORY PROVISIONS INVOLVED

Federal Rules of Criminal Procedure, Rule 16, *Discovery and Inspection (a); Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.*

> Rule 16. Discovery and Inspection (a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defen-

dant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the posssession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

. . . .

(g) Continuing Duty to Disclose; Failure to Comply. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not dis-

closed, or it may enter such other order as it deems just under the circumstances. As amended Feb. 28, 1966, eff. July 1, 1966.

Local Rules of Practice of the United States District Court for the District of Colorado, Rule 311, Pretrial Discovery And Inspection (Appendix C)

Federal Rules of Criminal Procedure, Rule 5.1, Preliminary Examination,

Rule 5.1 Preliminary Examination. . . . (c) Records. After concluding the proceeding of the federal magistrate shall transmit forthwith to the clerk of the district court all papers in the proceedings. The magistrate shall promptly make or cause to be made a record or summary of such proceeding.

(1) On timely application to a federal magistrate, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available for his information in connection with any further hearing or in connection with his preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.

(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient

affidavit that he is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor. Added April 24, 1972, eff. Oct. 1, 1972.

18 U.S.C. § 3060, Preliminary Examination.

§3060. Preliminary examination. . . . (f) Proceedings before United States magistrates under this section shall be taken down by a court reporter or recorded by suitable sound recording equipment. A copy of the record of such proceeding shall be made available at the expense of the United States to a person who makes affidavit that he is unable to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts. As amended Oct. 17, 1968, Pub. L. 90-578, Title III, §303(a), 82 Stat. 1117.

STATEMENT OF THE CASE

(All references to the record below will be Volume number followed by page number).

On August 4, 1972, a Complaint was filed in the United States District Court, District of Colorado, alleging that on June 23, 1972, Petitioner violated 21 U.S.C. §841(a)(1)

and 18 U.S.C. §2. (Vol. V 002). Pursuant to that Complaint, and in accordance with Federal Rules of Civil Procedure, Rule 5(c), a Preliminary Hearing was held on August 17, 1972, whereupon the United States Magistrate found probable cause to bind the case over for trial. (Vol. V 011).

On August 24, 1972, the Federal Grand Jury indicted Petitioner on two counts of knowingly and intentionally distributing and aiding and abetting in the distribution of a quantity of heroin in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. Count one was alleged to have occurred on June 22, 1972 and count two was alleged to have occurred on June 23, 1972. (Vol. V 003). Subsequently, Petitioner attempted to obtain a written transcription of the Preliminary Hearing, which had been electronically recorded pursuant to 18 U.S.C. §3060. Due to mechanical difficulties with the recording equipment, the records of the Hearing were not susceptible to accurate written transcription in that various portions of the recordings were incomplete and inaudible.

On October 26, 1972, Petitioner moved the District Court to enter an Order dismissing the case or in the alternative granting a new preliminary hearing on the grounds that valuable evidence had been lost through no fault of the Petitioner. (Vol. V 017). On October 27, 1972, a hearing was held before the Honorable Fred M. Winner with regards to the above-mentioned Motion. At this time, defense counsel for Petitioner advised the Court that he was unable to obtain an accurate written transcription of the mechanically recorded Preliminary Hearing and that without this accurate transcription the Petitioner would be deprived of sworn testimony which would be beneficial to the Petitioner for purposes of cross-examination at trial. (Suppl. Vol. I, 3). The Court denied Petitioner's Motion for a New Prelimi-

nary Hearing on the grounds that an indictment had been returned on the same charges subsequent to the date of the Preliminary Hearing and therefore Petitioner enjoyed no right to a new preliminary hearing. (Supp. Vol. I, 10).

Also on October 26, 1972, Petitioner filed a Motion for Discovery pursuant to Federal Rules of Criminal Procedure, Rule 16, and Local Rule 31, seeking to discover, among other things, "any written or recorded statements and the substance of any oral statements made by the accused or his co-defendant." In accordance with Local Procedure, defense counsel and the Assistant U. S. Attorney held meetings with regards to Petitioner's request for Discovery and in connection with those meetings the United States Attorney submitted a letter on October 26, 1972 indicating its position on the various requests for Discovery. The U. S. Attorney granted several of the requests, denied several of the requests as not required under Rule 16 or Local Rule 31, and further with regards to the request for any written or recorded statements and substance of any oral statements made by Petitioner, stated, that "as previously stated, Mr. Gomez made no post-arrest statements." (Vol. V 060). On October 27, 1972 at the above-stated Hearing before the Honorable Judge Winner, Petitioner's Motion for Discovery was also heard. At that time, the Court inquired of the Government whether it had any statements of the Petitioner. At that time, the Government indicated that it had no post-arrest statements of Petitioner. (Suppl. Vol. I, 13).

On December 11, 1972, Petitioner and Co-defendant Martinez were brought to trial on the above stated charges.

On December 12, 1972, at the beginning of the second day of trial, Co-defendant Martinez' attorney advised the Court that his client was presently in Denver General Hos-

pital and unable to attend the trial. For this reason, Mr. Martinez' counsel moved for a mis-trial as to his client. (Vol. II, 127). The Court granted the Motion as to Co-defendant Martinez. (Vol. II, 128). At this time, counsel for Petitioner informed the Court that he had intended to use Mr. Martinez as a witness for the purpose of refuting the testimony given by witnesses for the prosecution and inasmuch as Mr. Martinez was no longer available, also moved for a mis-trial on behalf of Petitioner. (Vol. II, 128). This Motion was denied. (Vol. II, 129).

The trial continued as to Petitioner. Agent Melvin B. Ashton of the Bureau of Narcotics and Dangerous Drugs testified that on June 22, 1972, Fred Sanchez approached Petitioner in the area of 10th Street and Osage and purchased two green balloons from him, which balloons allegedly contained heroin. (Vol. II, 152-155). Count one related to this alleged transaction and it is this count of which the jury acquitted the Petitioner.

With regards to the alleged transaction on June 23, 1972, Agent Ashton stated that he gave Sanchez $160.00. He further testified that Sanchez approached Petitioner, who was in his car in the area of 10th Street and Osage, and gave Petitioner this money, after which Petitioner took two objects from his mouth and gave them to Sanchez. The objects were determined to be balloons containing heroin. Ashton stated that Petitioner left the area but returned shortly thereafter. At this time, the passenger in the Petitioner's car, Co-defendant Martinez, gave Sanchez another balloon containing heroin. Ashton stated that at both of these alleged transactions on June 23, 1972, Co-defendant Martinez was present in the Petitioner's vehicle. (Vol. II, 167-177).

On direct examination, Agent Ashton stated that he saw

Petitioner at the Petitioner's residence on June 30, 1972. (Vol. II, 178). At this time, defense counsel requested a hearing at the bench, at which time defense counsel objected to the admission of any statements made by Petitioner to Agent Ashton on the grounds that these statements had not been given to the defense in connection with their Motion for Discovery. The Court permitted further questioning as to this issue, whereupon, Agent Ashton stated that he asked Petitioner if he remembered him and Sanchez from the delivery on June 23, 1972, to which Petitioner answered in the affirmative. Defense counsel again objected to any further testimony along this line and the Court sustained the objection.

On December 13, 1972, the jury returned a verdict of guilty as charged as to count two and the verdict of not guilty as to count one.

The questions herein were raised as the trial court and on appeal to the Court of Appeals. On direct examination, Undercover Agent Ashton was asked if he saw Petitioner around the time of June 30, 1972 and after giving an affirmative answer was asked to describe the circumstances of that meeting. At this time, counsel for Petitioner requested a hearing at the bench at which he objected to the admission of any statements made by Petitioner to Agent Ashton.

> Mr. Fogel: If this entails a conversation between Ashton and Gomez, it was my understanding that the pre-trial conference in front of I think Judge Winner that you were not going to introduce any statements made by any defendant to any agent.
>
> (Vol. II, 178).

Over this objection, the Court permitted further questioning as to the statement.

> Q. What did you say to Defendant Gomez at that time?
>
> A. I asked him if he remembered me and Frederick George Sanchez from the delivery which happened on the 23rd and he told me that he did. He told me he remembered my vehicle.
>
> Q. Did you direct your question specifically to the Defendant, or did you direct your question to the two men standing together, Mr. Martinez and the Defendant?
>
> A. Both men were seated in Mr. Gomez' vehicle, the black over green Chevrolet. I was on the driver's side and I was talking into the vehicle so both men could hear.
>
> Q. Okay, did you ask Mr. Gomez if he had any heroin available at that time?
>
> A. Yes, sir, I did. (Vol. II, 180).

As indicated previously, Petitioner moved the District Court to enter an order dismissing the case or in the alternative granting a new preliminary hearing on the grounds that valuable evidence had been lost through no fault of the Petitioner. (Vol. V, 017). (Supp. Vol. I, 3).

Motion for Discovery pursuant to Federal Rules of Criminal Procedure, Rule 16 and Local Rule 31, was made and hearing was held on this issue. (Supp. Vol. I, 13).

Motion for a Mis-trial was made on behalf of Petitioner, (Vol. II, 128) and said Motion was denied. (Vol. II, 129).

All issues presented here were duly presented to the Court of Appeals. (See Appendix A).

I. THE VERDICT RENDERED BELOW MUST BE REVERSED BY REASON OF THE FAILURE AND REFUSAL OF THE GOVERNMENT TO PERMIT DEFENSE COUNSEL TO INSPECT AND COPY PETITIONER'S PRE-ARREST STATEMENT MADE TO AN UNDERCOVER AGENT IN ACCORDANCE WITH FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 16 AND LOCAL RULE 31.

The issue presented here can be divided into two sections:

1. Is the summary of a pre-arrest statement made by a Defendant to an Undercover Agent subsequent to the alleged crime discoverable under Rule 16(a)(1);

2. Was the failure and refusal to allow discovery in this grounds for reversal.

The Court of Appeals, while recognizing that there are divergent views regarding the discoverability of the statement sought, declined to issue a ruling regarding that discoverability. Rather, the Court merely held that any error was not prejudicial. Petitioner respectfully urges that the issue of whether or not he was prejudiced by the failure to allow discovery is a question of law and should be determined by this Court. Additionally, the question of discoverability is one of major importance and should be determined before the question of prejudice is met. This question of the discoverability of this statement is an important question of interpretation of the Federal Rules of Criminal Procedure which has not been, but should be, settled by this Court.

While Petitioner was provided with a copy of this summary of his alleged statement, it was not provided until after the jury had been selected on the first day of trial. Petitioner contends that this matter of presentation was not sufficient to remedy the violation of the Rules of Discovery.

The purpose of the 1966 Amendment to Rule 16 was to liberalize the previously restricted practice of pre-trial discovery in criminal cases. The Notes of the Advisory Committee On Rules clearly state with regards to Rule 16 that "The Rule has been revised to expand the scope of pre-trial discovery." Rule 16 makes no distinction as to the time when statements are given with regards to their discoverability, and there is no indication in the Notes on the Advisory Committee on Rules that pre-arrest statements were not meant to be discoverable. At least three Circuits have held that pre-arrest statements are covered by Rule 16 and are therefore properly discoverable.

United States v. Bryant, 439 F.2d 642 (D.C. Circuit, 1971) held

> We agree with the panel of the Second Circuit that the Notes of the Advisory Committee on Rules indicate that the amended rule was intended to apply even to pre-arrest statements made by a defendant during a course of his crime and was meant to broaden materially the scope of discovery available to a defendant.

See also, *Davis v. United States,* 413 F.2d 1226 (5th Cir. 1969); *United States v. Cirsona,* 416 F.2d 107 (2nd Cir. 1969).

Inasmuch as the relevant statement made by the Defendant was contained in an investigative summary made by

Agent Ashton, the next issue is whether this summary of the Defendant's statement, as cited above, constitutes a "statement" within the Rule.

There is a split of authority as to how broadly the word "statement" in Rule 16(a)(1) is to be interpreted. Some Courts have defined "statements" in line with the definition given in the Jencks Act, 18 U.S.C. §3500(e); that is, a substantially verbatim recital of an oral statement. However, other Courts have ruled that inasmuch as the Advisory Notes to Rule 16 specifically state that the purpose is to expand the scope of discovery, coupled with the fact that Rule 16(a)(1) covers a defendant's statements, which are not covered directly in the Jencks Act, the meaning of "statements" under Rule 16 will not be restricted to that given in Jencks Act. See *United States v. Crisona,* supra; and *Wright Federal Practice and Procedures,* Vol. I, §253.

The problems which would arise from interpreting Rule 16(a)(1) as not allowing discovery of summaries of statements such as Petitioner's were discussed by the court in *United States v. Morrison,* 43 F.R.D. 516 (N.D. Ill. 167). In that case, the defendant had made several oral statements to Federal Agents, which were incorporated in written interview reports sometime after the conclusion of the interviews. The Government declined to reveal these summaries to the defendant on the ground that they were not "statements". In ordering the Government to reveal these statements to the defendant, the Court said:

> We believe, however, that the spirit of Rule 16(a)(1) could easily be evaded if the Government were able to conceal these reports from the defendant. Rule 16 was designed to liberalize the court's powers in regard to the grant of pre-trial

> discovery. Were we to deny a request for this material, we can foresee the day when Government agents could make it their practice to summarize their interviews, rather than recording them verbatim, in an effort to avoid discovery. The philosophy underlying Rule 16, in our judgment, applies equally to verbatim statements and summaries thereof. Therefore, we direct the Government to produce the summaries of the defendant's statements in its possession, custody or control.

See also, *United States v. Reid,* 43 F.R.D. 520 (N.D. Ill. 1967), *United States v. Curry,* 278 F.Supp. 508 (N.D. Ill. 1967).

This same attitude of liberalized discovery in criminal cases is evidenced in the *AMERICAN BAR ASSOCIATION'S STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL.* See specifically Section 2.1 (a) (ii).

In accordance with Local Rule 31(b)(c) which Rule attempts to implement Rule 16, if the United States Attorney claimed that any requested statement was not discoverable, it was his duty to file a written declination of the disclosure of any pre-arrest statements on the grounds relied for this declination. The failure of the U. S. Attorney to do this deprived Petitioner of his right to a hearing by the trial court on the question of discovery as to this statement.

While there is a general movement in favor of broadened pre-trial discovery in criminal cases, this Court has not ruled on this important area of Rule 16 regarding summaries of pre-arrest statements. Mindful of the potential dangers and abuses if such statements were to be exempt from the man-

date of the Rule, Petitioner believes this Court should consider this important question of interpretation of Rule 16.

By allowing Agent Ashton to testify regarding the pre-arrest statement of the Petitioner, and by failing to exercise its powers under Rule 16(g), the District Court committed error which was seriously prejudicial to Petitioner's case.

II. THE COURT ERRED IN DENYING PETITIONER'S MOTION FOR A NEW PRELIMINARY HEARING OR IN THE ALTERNATIVE DISMISSAL OF THE CASE ON THE GROUNDS THAT THE USEFULNESS OF VALUABLE EVIDENCE TO WHICH PETITIONER WAS ENTITLED HAD BEEN DESTROYED DUE TO FAULTY MECHANICAL RECORDING.

18 U.S.C. §3060 provides that a preliminary examination shall be held to determine if there is probable cause to believe the defendant committed th crime with which he is charged. See also *F. R. Crim. P.* Rule 5.1.

18 U.S.C. §3060(f) provides, inter alia,

> The proceedings before United States magistrates under this Section shall be taken down by a Court Reporter or recorded by suitable sound recording equipment. . . .

Federal Rules of Criminal Procedure, Rule 5.1, also gives the Defendant a right to be provided with a copy of the transcript of the preliminary examination. However, due to faulty recording equipment, the Petitioner was unable to obtain an accurate transcription of the recording of the preliminary examination.

There is a split of authority between the Circuits regarding the effect of an intervening indictment on rights granted by reason of Rule 5.1 and 18 U.S.C. §3060. This split of authority has not been previously settled by this Court.

In *Gardner v. United States* 407 F.2d 1266 (D.C. Cir. 1969), cert. denied, 395 U.S. 911 (1970), the Defendant exercised his right to have a preliminary examination. Subsequent thereto, he attempted to obtain a written transcript of the proceedings. No transcript could be provided inasmuch as the proceeding had not been recorded. Notwithstanding the fact that an indictment had been returned subsequent to this preliminary hearing, the Court ruled that the Defendant had a right to a written transcript upon request, saying:

> Timely objection to the denial of this right requires reversal of a conviction if an accused was prejudiced by the denial.

See also, *Blue v. United States,* 342 F.2d 894 (D.C. Cir. 1964); *Dancy v. United States,* 361 F.2d 75, (D.C. Cir. 1966).

The Tenth Circuit has consistently held that the sole purpose of a preliminary hearing is to determine whether sufficient evidence exists to warrant a finding of probable cause. Further, the Court has held that absent deliberate prosecutorial connivance, a preliminary hearing, however, is not required once a grand jury indictment is returned. See *United States v. Brumley,* 466 F.2d 911 (10th Cir. 1972) and *United States v. Kysar,* 459 F.2d 422 (10th Cir. 1972). Any discovery benefits inuring to the Defendant as a result of these hearings have been determined to be only incidental. *United States v. Milano,* 443 F.2d 1022 (10th Cir. 1971).

This position is based upon the reasoning that the sole purpose of the preliminary hearing is to determine probable cause and since a grand jury indictment establishes that fact, any rights which might accrue in connection with a preliminary hearing are overridden by the handing down of the indictment.

However, this Court has recognized that a preliminary hearing may be of much more importance to a Defendant than merely establishing probable cause. In *Coleman v. Alabama*, 399 U.S. 1. (1970), this Court in ruling that a preliminary hearing was the critical stage of the proceedings, stated that not only could counsel use the hearing to expose weaknesses which might result in failure to bind over, but that counsel could fashion a vital impeachment tool for use in cross examination at trial and could use the hearing to discover the case to be presented by the State and to properly prepare in the general defense at trial.

Surely these valuable considerations cannot be overruled because a grand jury indictment has intervened. Important rights such as these granted to Defendant should not be so easily withdrawn. The District of Columbia Circuit Court of Appeals cases are in line with the rulings of this Court insofar as they recognize the continuing existence of these rights after indictment and the broader value of a preliminary hearing. Petitioner urges this Court to rule on this issue and thereby settle the split in authority within the Circuit Courts.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM — 1973

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH RAYMOND GOMEZ, a/k/a
Joe Ray Gomez,
Defendant-Appellant.

NO. 73-1120

Appeal from the United States District Court
For the District of Colorado
(D.C. No. 72-CR-247)

John W. Madden, III, Assistant United States Attorney (James L. Treece, United States Attorney, on the brief), for Plaintiff-Appellee.

William L. Keating, of Ashen and Fogel (Marshall A. Fogel, on the brief), for Defendant-Appellant.

Before LEWIS, Chief Judge, and HOLLOWAY and McWILLIAMS, Circuit Judges.

McWILLIAMS, Circuit Judge.

Joseph Raymond Gomez was convicted by a jury of knowingly and intentionally distributing and aiding and abetting in the distribution of a quantity of heroin, in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2, the offense occurring on June 23, 1972. In a separate count, Gomez was similarly charged in connection with a transaction which had allegedly occurred on June 22, 1972. Gomez was acquitted on the charge arising out of the June 22 transaction.

Gomez urges the following as grounds for reversal of his conviction on the charge arising out of the June 23 transaction: (1) The refusal of the trial court to either dismiss the indictment or order a second preliminary hearing when it developed that the tape recording of his original preliminary hearing was faulty and, in part, inaudible; (2) the refusal of the trial court to grant a mis-trial at the same time it granted a codefendant a mistrial on the grounds of the codefendant's illness; and (3) the failure of the trial court to exclude certain testimony of a Government undercover agent wherein the agent related an admission against interest allegedly made by Gomez to the agent during the course of the agent's undercover investigative efforts and at a time when Gomez was still unaware that he was dealing with an undercover agent. We deem none of these matters to require a reversal.

I.

Gomez was afforded a preliminary hearing on August 17, 1972, at which time and place he was represented by retained counsel. We are advised that the only witness testifying at that hearing was Ashton, the undercover agent. On August 24, 1972, Gomez was indicted by a Federal Grand Jury. It later developed that the tape recording of the pre-

liminary hearing was faulty and, in part, inaudible. It was in this setting that Gomez filed a motion to either dismiss the indictment or order a secondary preliminary hearing on the ground that because of the unavailability of the recording of the entire preliminary hearing proceeding he had "lost important and valuable sworn testimony which he had intended to use at his trial." In this regard, it is apparently the position of counsel that the record of Ashon's testimony at the preliminary hearing could have been successfully used for impeaching purposes upon trial proper. The trial court, upon hearing, denied the motion, but in so doing advised counsel that he could renew his motion for a second preliminary hearing with a citation of supporting authority, if he be so inclined. This invitation was not accepted. Such failure to renew the motion in and of itself virtually forecloses a reversal on this ground. Be that as it may, under the circumstances as thus related we find no error on the part of the trial court.

The sole purpose of a preliminary hearing is to determine whether there is sufficient evidence to warrant continued detention of the accused. United States v. Brumley, 466 F.2d 911 (10th Cir. 1972), and United States v. Kysar, 459 F.2d 422 (10th Cir. 1972). Any discovery benefits inuring to the defendant as a result of such a hearing are only incidental. United States v. Milano, 443 F.2d 1022 (10th Cir. 1971), *cert. denied,* 404 U.S. 943 (1971). A failure to hold any preliminary hearing was not grounds for reversal, where the complaint was preempted by an indictment. United States v. Brumley, *supra.* And in *Milano,* we held that absent evidence of deliberate prosecutional connivance to deprive a person of a preliminary hearing by delay till after indictment, a defendant was not entitled to new trial even if the preliminary hearing had been improp-

erly delayed and by virtue of such delay was preempted by an intervening indictment. Under the reasoning of *Brumley* and *Milano*, it would appear that the failure to have a complete recording of the preliminary hearing available for Gomez would not justify a dismissal or the holding of a second preliminary hearing when an intervening indictment has been returned.

Even under the cases relied on by Gomez, the inability to give him a complete record of the preliminary hearing would not justify a reversal at this stage of the proceedings. For example, in Gardner v. United States, 407 F.2d 1266 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 911 (1969), it was held that a timely objection to the denial of the right of a defendant to a transcript of his preliminary hearing would only require a reversal "if an accused was prejudiced by the denial." In *Gardner*, no record of the preliminary hearing was ever made and hence could not be given the defendant. The defendant there indicated he would have used the transcript of the preliminary hearing to impeach the complaining witness. However, in *Gardner* it was held that such was an insufficient showing of prejudice and the conviction was affirmed. Similarly, in the instant case Gomez' claim of prejudice is conclusory in nature and singularly lacking in detail. For all these reasons, then, we regard this particular assignment of error to be without merit.

II.

Gomez was tried jointly with his coindictee, one Antonio Jose Martinez. On the morning of the second day of what turned out to be a three-day jury trial, Martinez became suddenly ill and hospitalized. Counsel for Martinez moved for a mistrial as to Martinez, which motion, upon showing, was granted. Counsel for Gomez immediately thereafter

moved for a mistrial and this motion was denied. Error is now predicated on this ruling of the trial court.

The principal ground urged on the trial court as to why Gomez should have been allowed a mistrial was counsel's statement that he proposed to use both Martinez and Gomez to rebut the testimony of the Government's undercover agent. In this regard, counsel was somewhat equivocal, advising the trial court that "possibly," and "possibly probably," he might want to call Martinez as a wi'ness for Gomez. In this regard, we find nothing in the record to indicate that Martinez and his counsel were agreeable to the former being called as a defense witness, even assuming that Martinez was physically able to appear at trial. It was in this factual setting that the trial court denied Gomez' motion for a mistrial. We find no error.

United States v. Pollack, 427 F.2d 1169 (5th Cir. 1970), *cert. denied*, 400 U.S. 831 (1970), closely resembles the instant case in this particular aspect. There, it was held that where a coindictee, who on the morning of the trial was hospitalized, had given no prior indication of intention to testify and there was no affidavit or other showing as to precisely what testimony could be expected from the coindictee, a denial of a request for a continuance on the ground that the coindictee was an indispensable witness was not an abuse of discretion. We subscribe to the result and reasoning in *Pollack*, and we find no abuse of discretion on the part of the trial court in denying Gomez' motion for mistrial.

III.

Prior to trial, Gomez filed a motion for discovery pursuant to Fed. R. Crim. P. 16, and local rule 31, seeking to discover, among other things, "any written or recorded state-

ments and the substance of any oral statements made by the accused, or by his codefendant." In response thereto, the Government answered to the effect that Gomez made no "post arrest statements." The matter was not pursued further at that ime, and the matter only surfaced upon trial.

As trial of this case was about to commence, the Government, pursuant to the provisions of 18 U.S.C. §3500, furnished defense counsel with an investigative summary prepared by undercover agent Ashton, who, as above indicated, was a key Government witness. That narrative summary, insofar as is here pertinent, reads as follows:

> *"DETAILS:*
>
> 1. On June 30, 1972, S/A Mel Ashton was driving OGV N-4991 in the vicinity of 11th Avenue and Osage Avenue. At approximately 6:00 P.M., S/A Mel Ashton observed GOMEZ exit 1154 Osage and proceed to his vehicle, AZ-470. GOMEZ was accompanied by MARTINEZ. S/A Mel Ashton contacted GOMEZ and MARTINEZ.
>
> 2. S/A Ashton asked GOMEZ and MARTINEZ if they remembered doing business with Frederick George SANCHEZ and S/A Mel Ashton on June 23, 1972 (delivery of 1A and 1B). ***GOMEZ and MARTINEZ answered in the affirmative.*** GOMEZ stated that he remembered OGV N-4991." (Emphasis added.)

When agent Ashton was about to testify as to his conversation with Gomez of June 30, 1972, wherein Gomez, according to Ashton, "answered in the affirmative" when asked if he "remembered doing business with Frederick

George Sanchez and S/A Mel Ashton on June 23, 1972," objection was made and the objection was overruled and the testimony above referred to was permitted to go to the jury. This ruling of the trial court is now claimed to be prejudicial error necessitating a new trial. We disagree.

The disagreement between the parties on this particular matter can perhaps best be demonstrated by noting that Gomez claims Ashton's narrative summary containing a statement attributed to him should have been produced under Rule 16, whereas the Government contends that such a document need not be produced under Rule 16, and need only be produced, as it was, at trial in conformity with 18 U.S.C. §3500.

In his denial of Gomez' motion for a new trial, the trial court indicated, though there was no formal ruling as such, that Ashton's narrative summary should have been produced under Rule 16, but that inasmuch as the document in question was in fact given Gomez at the outset of his trial, there was no resulting prejudice. In the posture we find this particular issue, we are disinclined to come to grips with the question as to whether Ashton's narrative summary was discoverable under Rule 16, or need only be produced under 18 U.S.C. §3500. Apparently there is a diversity of judicial thought on this particular matter. However, like the trial court, we too under the circumstances are unable to find any prejudice, even assuming improper delay in turning over Ashton's narrative summary to defense counsel.

At the outset, we would note that an application for relief under the discovery rules is a matter within the sound discretion of the trial court, and its ruling will not be disturbed in the absence of an abuse of discretion. In this regard, we further note that Rule 16(g) provides the trial court with

considerable latitude even though it be shown that there has been a failure to comply with Rule 16 or an order of court issued pursuant thereto, i.e., exclusion of the proffered evidence is only one of the available remedies. Additionally, prejudice must be shown as a result of the Government's failure to produce the evidence which defendant sought to obtain. In the instant case, as indicated, Gomez was given Ashton's narrative summary containing the statement attributed to him on June 30, 1972, at the outset of the trial proper. In such setting, counsel's difficulty in showing resulting prejudice is most uderstandable. In support of the foregoing, *see* such cases as United States v. Cole, 457 F.2d 1141 (9th Cir. 1972), *cert. denied*, 409 U.S. 868 (1972); United States v. Fioravanti, 412 F.2d 407 (3d Cir. 1969), *cert. denied sub nom*, Panaccione v. United States, 396 U.S. 834 (1969); United States v. Battaglia, 410 F.2d 279 (7th Cir. 1969), *cert. denied*, 396 U.S. 848 (1969); and Walsh v. United States, 371 F.2d 436 (1st Cir. 1967), *cert. denied*, 387 U.S. 947 (1967).

Judgment affirmed.

APPENDIX B

SEPTEMBER TERM — OCTOBER 2, 1973

Before Honorable David T. Lewis, Chief Judge, Honorable William J. Holloway, Jr., and Honorable Robert H. McWilliams, Circuit Judges

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH RAYMOND GOMEZ, a/k/a Joe Ray Gomez,
Defendant-Appellant.

NO. 73-1120

This matter comes on for consideration of the petition for rehearing filed by the appellant.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS,
Clerk

APPENDIX C

Rule 31 Pretrial Discovery and Inspection

(a) Within seven (7) days after the arraignment the United States Attorney and the defendant's attorney shall confer, and upon request, the government shall:

(1) Permit defendant's attorney to inspect and copy or photograph any relevant written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government;

(2) Permit defendant's attorney to inspect and copy or photograph any relevant results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government;

(3) Permit defendant's attorney to inspect and copy or photograph any relevant recorded testimony of the defendant before a grand jury;

(4) Permit defendant's attorney to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places which is the property of the defendant and which are within the possession, custody or control of the government;

(5) Permit defendant's attorney to inspect and copy or photograph the Federal Bureau of Investigation Identification Sheet indicating defendant's prior criminal record;

(6) Permit defendant's attorney to inspect, copy or photograph any evidence favorable to the defendant;

(b) If, in the judgment of the United States Attorney, it would not be in the interests of justice to make any one or more disclosures set forth in paragraph (a) and requested by defendant's counsel, disclosure may be declined. A declination of any requested disclosure shall be in writing, directed to defendant's counsel, and signed personally by the United States Attorney or the First Assistant United States Attorney and shall specify the disclosures which are declined, together with the reasons for such declination. Such written declination shall be served on defendant's counsel and filed with the Court within 10 days of the arraignment.

(c) If additional discovery or inspection is sought, written request therefor shall be made by defendant's counsel at the conference required by paragraph (a) hereof. If the United States Attorney declines to furnish such additional discovery or inspection, such written declination, including the reasons therefor, shall be served and filed in accordance with the provisions of paragraph (b) hereof.

(d) If the United States Attorney files such written declinations under the provisions of paragraphs (b) or (c) hereof, the Court will hear and

determine the matters in issue as if defendant's counsel had filed formal motions to discover or inspect the material described in such declinations.

(e) Any duty of disclosure and discovery set forth in this Rule is a continuing one and the United States Attorney shall produce any additional information gained by the government.

(f) Any disclosure granted by the government pursuant to this Rule of material within the purview of Rules 16(a)(3) and 16(b), Federal Rules of Criminal Procedure, shall be considered as relief sought by the defendant and granted by the Court.

(g) It is the intent of this Rule to provide for the furnishing and the interchange of information by and between counsel in a cooperative manner without necessity for recourse to the Court.

(h) All other motions shall be filed within 15 days of the arraignment.